Supreme Court, U.S.
FILED

99 178 JUN 2 1 1999

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1998

VIRGINIA MORTGAGE CO.,

Petitioner,

vs.

UNITED STATES OF AMERICA
and HAROLD MILHOLEN
d/b/a THE BASIC GROUP

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Norman B. Smith
Smith, James, Rowlett & Cohen
P.O. Box 990
Greensboro, NC 27402-0990
(336) 274-2992

Attorney for Petitioner

45pp

QUESTIONS PRESENTED

I. Whether a District Court Can Decide the Ultimate Question Against a Plaintiff in Order to Grant Summary Judgment for a Defendant.

II. Whether a Purchaser at an IRS Tax Sale Is an "Innocent Purchaser" under North Carolina Law.

III. Whether "Temporary Staff Shortages" Can Constitute "Excusable Neglect" under Federal Rule of Civil Procedure 6(b)(2).

IV. Whether a District Court Can Grant a Motion to Dismiss for Lack of Jurisdiction When Jurisdiction Exists as a Matter of Law, Merely Because the Motion Is Unopposed.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND RULE INVOLVED 1

STATEMENT OF THE CASE 3

REASON FOR GRANTING THE WRIT 5

The District Court Erred by Determining the Ultimate Question Against Virginia Mortgage in Order to Grant Summary Judgment to Milholen 5

The District Court Erred Granting Summary Judgment to Milholen Because He Is Not an Innocent Purchaser Protected by the Pure Race Scheme 10

The District Court Erred Granting as Unopposed the United States' Motion to Dismiss by Refusing to Grant Virginia Mortgage's Motion for Additional Time to Respond .. 12

The District Court Erred Granting the United States' Motion to Dismiss for Lack of Jurisdiction Because it Had Jurisdiction

as a Matter of Law 15

CONCLUSION 27

INDEX TO APPENDICES

APPENDIX A
Decision of the Court of Appeals

APPENDIX B
Decision of the District Court

TABLE OF AUTHORITIES

Cases **Page**

Anderson v. IRS
1992 U.S. Dist. LEXIS 8126 (S.D. Ohio 1992) 17

Anderson v. Zenali
1996 U.S. Dist. LEXIS 11059;
96-2 U.S. Tax Cas. (CCH) ¶50,448 (C.D. Cal 1996) .. 10

Aqua Bar & Lounge v. United States
438 F. Supp. 655 (E.D. Pa. 1977) 7

Aqua Bar & Lounge v. United States
539 F.2d 935 (3rd Cir. 1976) 17, 19

Bartel v. United States
No. 96-1022-MLB (D. Kan. Sep. 29, 1997) 7

Bay Savings Bank v. Internal Revenue Service
837 F. Supp. 150 (E.D. Va. 1993) 21

Bleavins v. United States
1990 U.S. App. LEXIS 23,294 (7th Cir. 1990) 17

Brewer v. United States
764 F. Supp. 309 (S.D.N.Y. 1991) 19, 20

Dahn v. United States,
127 F.3d 1249 (10th Cir. 1997) 26

Dept. of Transportation v. Humphries
1998 N.C. LEXIS 101 (N.C. 1998) 5

Federal Deposit Ins. Corp. v. Morrison
747 F.2d 610 (11th Cir. 1984) 8

Felkel v. United States
861 F. Supp. 507 (D.S.C. 1994 21

Fidelity and Deposit Company of Maryland v. City of Adelanto
87 F.3d 334 (9th Cir.1996) 26

Freedom Mission Church v. Green Bay Packaging, Inc.
816 F. Supp. 513 (E.D. Ark. 1993) 19

Goodwin v. United States
935 F.2d 1061 (9th Cir. 1991) 7, 8, 17, 18

Hill v. Pinelawn Memorial Park, Inc.
282 S.E.2d 799 (N.C. 1981) 5, 10, 12

Holt v. United States
46 F.3d 1000 (10th Cir. 1995) 23

Jenkins v. McKeithen
395 U.S. 411 (1969) 15

Kulawy v. U.S.
917 F.2d 729 (2nd Cir. 1990) 7, 19

Lawling v. Jaynes
206 S.E.2d 162 (N.C. 1974) 11

Lawrence v. Beaman
90-2 USTC ¶ 50,514 (D. Mass. 1990) 19

Mid-State Homes, Inc. v. Portis
652 F.Supp. 640 (W.D. La. 1987) 8

Murray v. United States,
520 F. Supp. 1207 (D.N.D. 1981),
aff'd, 686 F.2d 1320 (8th Cir. 1982) 17

Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership
507 U.S. 380 (1993) 13, 14

Reece v. Scoggins
506 F.2d 967 (5th Cir. 1975) 7

Scheuer v. Rhodes
416 U.S. 232 (1974) 15

Stevedoring Services of America v. Ancora Transport
884 F.2d 1250 (9th Cir. 1989) 17

Thatcher v. Powell
6 Wheat. 119, 5 L. Ed. 221 (1821) 6

The National Bank & Trust Co. v. United States
589 F.2d 1298 (7th Cir. 1978) 24

Thompson v. E.I. Dupont de Nemours & Co., Inc.,
76 F.2d 530 (4th Cir. 1996) 14

TMG II v. United States
778 F. Supp. 37 (D.C.D.C. 1991) 20, 21

Travis v. United States
73 A.F.T.R.2d 1828 (E.D. Cal. 1994) 21

United States v. Williams
514 U.S. 527 (1995) 25

Verba v. Ohio Casualty Insurance Co.
851 F.2d 811 (6th Cir. 1988) 8

Verba v. Ohio Casualty Insurance Co.
93-2 U.S.T.C. ¶50,363
71 A.F.T.R.2d 2013 (N.D. Ohio 1993) 21

Statutes

26 U.S.C. § 6321 16

26 U.S.C. § 6322 16

26 U.S.C. § 6335 6

26 U.S.C. § 6339(b)(2) 11, 16

26 U.S.C. § 7426 22

Rules

Fed. R. Civ. P. 6(b)(2) 12

OPINIONS BELOW

The opinion of the Court of Appeals issued in support of its judgment is unpublished, per curium, but reported as *Virginia Mortgage Company v. United States of America; Harold Milholen, a/k/a/ The Basic Group*, 1999 U.S. App. LEXIS 4809 (March 22, 1999) and is reprinted in Appendix A.

The opinion of the District Court is reported as *Virginia Mortgage Co., v. United States of America, and Harold Milholen, d/b/a/ The Basic Group*, 1998 U.S. Dist. LEXIS 13359; 82 A.F.T.R.2d (RIA) 6036 (August 12, 1998) and is reprinted in Appendix B.

JURISDICTION

The opinion of the Court of Appeals in this case was filed on March 22, 1999. This petition is therefore timely under Supreme Court Rules 13.1, 13.3, 29.2, & 30.1 if (mailed U.S.P.S. first class) postmarked by June 21, 1999.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

This case involves application of the following statutes and rule.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6321.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

26 U.S.C. § 6322.

(a) Notice of seizure

As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) Notice of sale

The Secretary shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a) . . .

26 U.S.C. § 6335.

(b) Deed of real property

In the case of the sale of real property pursuant to section 6335 -

(2) Deed as conveyance of title

If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

26 U.S.C. § 6339.

(a) Actions permitted

(1) Wrongful levy. If a levy has been made on property or property has been sold pursuant to a levy, and any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

26 U.S.C. § 7426.

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them.

Fed.R.Civ.P. 6(b).

STATEMENT OF THE CASE

This case concerns real property, including a warehouse, located at 158 Credle Street in Pittsboro, Chatham County, State of North Carolina ("the Property"). (B-2) The Property was originally owned by N&S Vending Services, Inc. ("N&S") and was allegedly seized by the Internal Revenue Service ("IRS") and sold on May 29, 1997 to Basic Machinery Company, Inc. ("Basic"). (B-2) Basic recorded an IRS Director's Deed on December 3, 1997. (B-4) Subsequently, Defendant Milholen ("Milholen") acquired Basic's interest in the Property. (B-2)

Prior to these events, however, Plaintiff ("Virginia Mortgage") had purchased the property from N&S. (B-5) On the date of the purchase, August 5, 1996, Virginia Mortgage filed a "Notice of Federal Common Law Lien" asserting a $300,000 interest in the property. (B-5) Virginia Mortgage received no notices required to be given owners relevant to the seizure and sale of the Property by the IRS. (Record as a whole).

On October 24, 1997, Virginia Mortgage filed its Complaint to Quiet Title pursuant to 28 U.S.C. § 2410(a) and for damages pursuant to 26 U.S.C. § 7433. (B-2)

On December 23, 1998, Milholen filed a Motion to Dismiss alleging, among other things, that Virginia Mortgage had no ownership interest in the real property. (B-3) On February 26, 1998, the district court converted the motion to one for summary judgment and ordered Virginia Mortgage to respond by April 1, 1998. (B-3) On April 1, 1998, Virginia Mortgage responded to Milholen's motion. On April 9, 1998, Milholen filed a reply brief.

On May 21, 1998, Defendant United States ("United States") filed a Motion to Dismiss alleging a lack of subject matter jurisdiction. (B-6) On June 23, 1998, the district court clerk, having received no response brief, informed Virginia Mortgage that the United States' motion would be referred to the court on July 13, 1998, for consideration as an unopposed motion. (B-6) On July 13, 1998, Virginia Mortgage filed it response to United States' motion. (B-6) On July 15, 1998, Virginia Mortgage filed a Motion for Additional Time to Respond asserting as excusable neglect personnel shortages in the office of Virginia Mortgage's counsel. (B-6) On July 17, 1998, Virginia Mortgage filed an amendment informing the court that the United States did not object to the Motion for Additional Time. (B-6)

On August 12, 1998, the district court granted Milholen's motion because it determined Virginia Mortgage had no current ownership

interest in the property and granted the United States' motion as unopposed. (B-6 & B-9). The district court denied Virginia Mortgage's Motion for Additional Time holding that staff shortages do not constitute excusable neglect. (B-9)

On March 22, 1999, the Fourth Circuit Court of Appeals affirmed in an unpublished, per curium decision stating that "summary judgment was properly granted in favor of Milholen because Virginia Mortgage failed to sufficiently show an ownership interest in the subject property and that the action against the United States was properly dismissed as an unopposed motion. (A-2)

This timely petition follows.

REASON FOR GRANTING THE WRIT

Even though North Carolina uses a "pure race" property recording scheme, *Dept. of Transportation v. Humphries*, 1998 N.C. LEXIS 101, *9-10 (N.C. 1998), recording does not "create" ownership interests; rather, it gives priority to **innocent** purchasers for value who record first. *Hill v. Pinelawn Memorial Park, Inc.*, 282 S.E.2d 799, 783 (N.C. 1981). Here, the pure race statute does not terminate Virginia Mortgage's ownership interest because: (1) Basic's deed is void, and (2) Milholen is not an innocent purchaser.

I. THE DISTRICT COURT ERRED BY DETERMINING THE ULTIMATE QUESTION AGAINST VIRGINIA MORTGAGE IN ORDER TO GRANT SUMMARY JUDGMENT TO MILHOLEN

The district court granted summary judgment for Milholen because "there is no genuine issue of material fact concerning Virginia Mortgage's lack of [current] ownership in the Property." (B-5 - B-6) The district court based it conclusion on a lack in the record of any evidence of a recorded document bearing (1) the signatures of both N&S and Virginia Mortgage, and (2) the corporate

seal of N&S. (B-5) The crux of the district court's analysis is that the recording of Basic's deed cut off any ownership rights Virginia Mortgage had to the Property under North Carolina's pure race recording scheme.

This puts the cart before the horse, however. If Basic's deed is void (which is the ultimate determination sought by the Complaint), then Virginia Mortgage is still free to correct any alleged insufficiencies and record a proper deed.

Basic's deed is void and transferred no interest whether recorded or not.

A. Failure of the IRS to Strictly Comply with Notice Requirements Renders the Deed Void.

The record discloses that an IRS Director's deed, allegedly transferring N&S's interest in the Property to Basic, was recorded on December 3, 1997. A fundamental principle of administrative tax sales is that the statutory procedure for confiscation of property and the issuances therefrom must be precisely followed. The IR Code requires that owners receive notices of seizure and sale. 26 U.S.C. § 6335. Congress was aware of the strict nature of its requirements when it enacted § 6335 because this Court concluded the matter early in this country's jurisprudence.

> That no individual or public officer can sell, and convey a good title to, the land of another, unless authorized so to do by express law, is one of those self-evident propositions to which the mind assents, without hesitation; and that the person invested with such a power **must pursue with the precision the course prescribed by law**, or his act is invalid, is a principle which has been repeatedly recognized in this Court.

Thatcher v. Powell, 6 Wheat. 119, 125, 5 L. Ed. 221, 222 (1821).

Every Supreme Court and Court of Appeals decision, state and federal, addressing the issue has held that the enabling statutes for seizure, sale, and conveyance of title must be strictly complied with. Without strict compliance, a tax sale cannot stand, and all conveyances therefrom are void ***ab initio***. *E.g., Aqua Bar & Lounge v. United States*, 438 F. Supp. 655, 657 (E.D. Pa. 1977) (the failure to give required notice of either the notice of seizure or sale is "sufficient grounds for invalidating the sale" even where the owner "received actual written notice through the mail." "Once this Court finds that the prescribed method was not followed, then the Court **must** invalidate the tax sale."); *Reece v. Scoggins*, 506 F.2d 967, 971 (5th Cir. 1975) ("[t]he language of this section is clear and mandatory; absent literal compliance with its provisions, the government sale of land **cannot** stand."); *Bartel v. United States*, No. 96-1022-MLB (D. Kan. Sep. 29, 1997) ("the government sale of land cannot stand" without "literal compliance" of § 6335; therefore, an invalid IRS sale does **not** pass all right, title and interest to the purchaser); *Kulawy v. U.S.*, 917 F.2d 729, 734 (2nd Cir. 1990) (the extraordinary powers granted to the government of levying, seizing, and selling property for tax collection purposes without prior judicial hearing are dependent upon strict compliance with the procedures prescribed by statute).

In *Goodwin v. United States*, 935 F.2d 1061 (9th Cir. 1991), the Ninth Circuit addressed the issue as follows:

> The Second Circuit, in *Kulawy v. United States*, 917 F.2d 729 (1990), recently addressed the question whether there must be strict compliance with the notice requirements of § 6335. The Second Circuit held that the extraordinary powers granted to the government of levying, seizing and selling property for tax collection purposes without prior judicial hearing **are dependent upon strict compliance with the procedures prescribed by statute**. Id. at 734.

> . . . the necessity for complying with § 6335(d) could be no greater than the necessity for complying with §§ 6335(a) and 6335(b). In following the Second Circuit, **we hold that the language and purpose of § 6335(a) and § 6335(b) require that the government be held accountable for failure to strictly comply with the procedures prescribed by the two provisions**. *See Kulawy*, 917 F.2d at 735.
>
> Moreover, because § 6335 requires strict compliance, **Goodwin did not have the burden of demonstrating prejudice**. *Cf. id.*
>
> Although we would not apply a literal reading of a statute that required a result demonstrably in conflict with the drafter's intentions, no such apparent conflict exists here. [Citation omitted]. Congress has set forth **precise requirements for notice of seizure and sale of property** in tax deficiency situations. "[W]hen the government seeks to enforce the laws, **it must follow the steps which Congress has specified**." *Reece*, 506 F.2d at 971. The government did not give Goodwin the notice required by § 6335. Accordingly, as between Goodwin and the government, the seizure and sale of the Gladstone property was invalid.

Goodwin, 935 F.2d at 1065. [Emphasis added].

B. Virginia Mortgage Had an Ownership Interest Requiring Notice.

At the time of the IRS' seizure and sale, there was a document entitled "Notice of Federal Common Law Lien" recorded by Virginia Mortgage asserting a $300,000 interest in the Property. In a case squarely on point, the Sixth Circuit held that a judgment lien was a property interest for due process purposes. *Verba v. Ohio Casualty Insurance Co.*, 851 F.2d 811 (6th Cir. 1988). Additionally, a second mortgagor has been found to possess a significant constitutionally

protected property interest. , *Mid-State Homes Inc. v. Portis*, 652 F. Supp. 640 (W.D. La. 1987). The Eleventh Circuit has held that a mortgagor's equity of redemption and statutory right to redeem created under Alabama law are constitutionally protected property interests. *Federal Deposit Ins. Corp. v. Morrison*, 747 F.2d 610, 614 (11th Cir. 1984), *cert. denied*, 474 U.S. 1019 (1985). These interests, like Virginia Mortgage's herein, are intangible non-possessory interests attached to a particular piece of property, and all are constitutionally protected property interests within the meaning of the Due Process Clause of the Fifth Amendment.

Accordingly, since Virginia Mortgage had a constitutionally protected property interest in the subject property, the United States was required to serve the notices required by § 6335. In addition to this interest in the property, the record reflects that Virginia Mortgage purchased the Property and tendered funds on August 5, 1996. (B-5)[1]

C. Virginia Mortgage Did Not Receive the Required Notices.

It is undisputed that Virginia Mortgage did not receive personal service of the Notices of Seizure or Sale. (Record as a whole) Because Virginia Mortgage had a sufficient ownership interest in the Property to require service of the notices of seizure and sale, the United States' failure to give such notice renders the seizure, sale, and subsequent deed void. Because the recorded deed is void, there is nothing to cut off Virginia Mortgage's ownership interest as found by the district court.

Consequently, the district court's grant of summary judgment was error both because (1) it failed to accept the facts pled in the

---

1. The district court ignored these facts stating the Declaration was not authenticated under Rule 56(e). Yet, this Declaration did not seek to authenticate documents. The facts stated were admissible pursuant to 28 U.S.C. § 1746.

Complaint as true on a motion for summary judgment and (2) its ruling was erroneous as a matter of law.

Because the courts below decided these questions of federal tax law in a way that conflicts with relevant decisions of this Court, a writ of certiorari should issue.

II. THE DISTRICT COURT ERRED GRANTING SUMMARY JUDGMENT TO MILHOLEN BECAUSE HE IS NOT AN INNOCENT PURCHASER PROTECTED BY THE PURE RACE SCHEME

Assuming arguendo that the Director's Deed was valid, summary judgment was still inappropriate. As noted above, the "registration statute does not protect all purchasers, but only innocent purchasers." Hill, 282 S.E.2d at 783. Basic and Milholen are not a innocent purchasers because (1) tax sale purchasers are not innocent purchasers, as a matter of law, and (2) they had actual notice of the instant litigation.

A. Tax Purchasers Are Not Innocent Purchasers.

The Central District of California has held that the IR Code gives sufficient constructive notice to all persons to the extent that nobody is a bona fide purchaser at a tax sale. The court stated that:

> The individual defendants argue that the Court wrongly decided that A. Zenali was not a [bona fide purchaser]. California law provides that "facts which should put a reasonable person on inquiry . . . may amount to constructive notice." [Cites omitted.] In a similar case, the purchaser was found to have had notice of 26 U.S.C. § 6339(b)(2), requiring the IRS to substantially comply with the law before it can transfer property rights. *Martin v. Rubel Enterprises*, No. CV 92-3184 DT (Tx), Findings of Facts and Conclusions of Law at 4 (C.D. Cal. Dec. 30, 1994). A

> **reasonable purchaser of property from an IRS tax sale has constructive notice that the IRS must substantially comply with the law in order to convey property.**

Anderson v. Zenali, 1996 U.S. Dist. LEXIS 11059, at *3-4; 96-2 U.S. Tax Cas. (CCH) ¶50,448 (C.D. Cal 1996) (Emphasis added).

In North Carolina, he "who claims to be a bona fide purchaser for value without notice so as to avoid the defective character of his deed has the burden of proving that fact." *Lawling v. Jaynes*, 206 S.E.2d 162, 170 (N.C. 1974).

Because Basic purchased the Property at a tax sale, it received constructive notice, as a matter of law, that its deed was invalid unless literal compliance with the notice provisions of § 6335 were fully complied with. Basic had statutory notice that without such compliance the Director's Deed did not convey any right, title, or interest in the Property. 26 U.S.C. § 6339(b)(2). Milholen had the same notice when he knowingly purchased Basic's interest in the Property.

Put in simpler terms, this is the risk that all gamblers take when purchasing property at tax sales in exchange for substantially reduced prices.

Milholen has failed to meet his burden of proof. Consequently, the district court's grant of summary judgment was error as a matter of law.

Because this question involves an important question of federal tax law that should be decided by this Court, a writ of certiorari should issue.

B. Basic and Milholen Had Actual Notice of Virginia Mortgage's Challenge to the Deed's Validity.

The Complaint was filed before the Director's Deed was recorded. This action was filed on October 24, 1997. The same day,

service was made upon counsel for Basic. Milholen is an officer of Basic. Milholen was the sole authenticator of Basic's documents in this case. The Director's Deed was issued on December 1, 1997, and recorded on December 3, 1997. It is, therefore, incontestible that Basic and Milholen had actual notice of this lawsuit before the Director's Deed was recorded.

In North Carolina, a purchaser must prove by a preponderance of the evidence that he is an innocent purchaser before he can claim the protection of the pure race recording statute. *Hill*, 283 S.E.2d at 783. This requires proof that he had no actual notice of pending litigation affecting title to the property. *Id.* Because Basic and Milholen had actual notice of this litigation prior to the recording of the Director's deed, they are not protected by North Carolina's pure race statute, and Virginia Mortgage's interest in the Property is unaffected.

Milholen has failed to meet his burden of proof. Consequently, the district court's grant of summary judgment was error as a matter of law. At the very least there is a genuine issue of material fact sufficient to defeat summary judgment.

Because a grant of summary judgment in the face of a genuine fact issue is contrary to the relevant decisions of this Court, a writ of certiorari should issue.

III. THE DISTRICT COURT ERRED GRANTING AS UNOPPOSED THE UNITED STATES' MOTION TO DISMISS BY REFUSING TO GRANT VIRGINIA MORTGAGE'S MOTION FOR ADDITIONAL TIME TO RESPOND

The district court granted the United States' motion to dismiss as unopposed after Virginia Mortgage filed its opposition thereto and motion for additional time a month late because "[a]llowing the Rules to be avoided because of regularly occurring events such as temporary staff shortages or heavy caseloads would undermine the Rules' purpose of ensuring uniformity." (B-8) Even when the

movant does not object to granting additional time to respond. Id.

Federal Rule of Civil Procedure 6(b)(2) governs motions for enlargement of time sought after expiration of the specified time period. This rule provides a district court with discretion to order an extension even after the expiration of a specified time period resulting from excusable neglect. Fed. R. Civ. P. 6(b)(2).

This Court defined excusable neglect in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993). This Court reasoned that courts could accept late filings due to inadvertence, mistake or carelessness, and intervening circumstances beyond a parties control. *Pioneer*, 507 U.S. at 388. To ascertain whether a delay in filing is excusable, courts must consider "all relevant circumstances surrounding the party's omission." *Pioneer*, 507 U.S. at 395. Factors relevant to this inquiry include:

> the danger of prejudice to the [non-movant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. Finally, this Court noted that:

> the lack of any prejudice to the [non-movant] or to the interests of efficient judicial administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim.

Pioneer, 507 U.S. at 398.

Here, the United States consented (had no objection) to the filing of Virginia Mortgage's brief. Efficient judicial administration was not thwarted because Virginia Mortgage's pleading was filed on the day the motion was submitted to the court. The district court's

opinion was issued thirty days thereafter. Virginia Mortgage played no part in the delay. Virginia Mortgage's counsel asserted a personnel shortage in his office caused the delay. (B-8)

Considering the judicial preference to resolving cases on the merits, the *de minimus* delay, if any, in this record does not justify granting a motion to dismiss unopposed. This is particularly so considering that this Court defined excusable neglect using the "more liberal approach," *Pioneer*, 507 U.S. at 385, in order to affirm a finding of excusable neglect.

The district court equated the delay to the "inexcusable run-of-the-mill inattentiveness" the court found in *Thompson v. E.I. Dupont de Nemours & Co., Inc.*, 76 F.2d 530, 535 (4th Cir. 1996). (B-7) *Thompson*, however, dealt with the delay caused by an attorney mailing a notice of appeal just three days before it was due when that attorney "had been put on notice in [that] very case that three days was insufficient for a letter to reach the court." *Id.* There was no explanation as to why the attorney did not mail the notice sooner. *Thompson*, 76 F.3d at 534. Neither did the attorney make any effort to check on the progress of the notice of appeal despite notice that three days was insufficient. *Thompson*, 76 F.3d at 535. The instant facts and attorney's explanation is a far cry from *Thompson*, and the district court's application of that case here was an abuse of discretion.

While discretion is broad, it is not limitless. It is a abuse of discretion to dismiss a civil case without addressing the merits by ignoring a filed pleading because it was filed out of time due to unexpected staff shortages in the attorney's office where there was no danger of prejudice, the impact on the proceeding was *de minimus*, and the parties acted in good faith. The district court's bright line rule that staff shortages never amount to excusable neglect, (B-8), is simply contrary to this Court's requirement that courts consider "all relevant circumstances surrounding the party's omission."

Because the district court granted the motion to dismiss using a bright line rule contrary to the relevant decisions of this Court, a writ of certiorari should issue.

IV. THE DISTRICT COURT ERRED GRANTING THE UNITED STATES' MOTION TO DISMISS FOR LACK OF JURISDICTION BECAUSE IT HAD JURISDICTION AS A MATTER OF LAW

The United States' moved to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction. In its memorandum, the United States alleged that jurisdiction could not rest on 28 U.S.C. § 2410, 26 U.S.C. § 6335, or 26 U.S.C. § 7433. The district court granted the motion as an unopposed motion. (B-6 - B-9). It did not discuss the merits of the motion. Id.

On review of the district court's granting of a Rule 12(b) motion, this Court is required to accept as true the factual allegations in the Virginia Mortgage's Complaint and is required to construe those facts in the light most favorable to the Virginia Mortgage. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). This Court may affirm only where it appears beyond doubt that Virginia Mortgage is entitled to no relief under any set of facts it could prove in support of its claim. *Jenkins*, 395 U.S. at 422.

The district court had subject matter jurisdiction as a matter of law.

A. 28 U.S.C. § 2410.

The thrust of United States' argument was that the district court lacks subject matter jurisdiction pursuant to § 2410, because the United States has released all liens on the property. Virginia Mortgage contends on the other hand that: (1) the IRS did not convey good title to the purchaser, and it therefore continues to have a

statutory lien on the subject property notwithstanding the fact its notices of tax lien were released, and (2) the United States had a lien interest in the disputed property when the Complaint was filed.

1. The United States has a statutory lien on the Property because it did not convey a valid title to Basic.

The Internal Revenue Code provides for statutory liens under the provisions of 26 U.S.C. §§ 6321 and 6322. The statutory lien arises "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand . . . upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. § 6321. The statutory lien continues "until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. § 6322.

In order for the United States to have no statutory lien on the subject property, and to have conferred good title by the Director's Deed, the sale of the Property to Basic must have been in accordance with 26 U.S.C. § 6339(b)(2), which provides in pertinent part:

> if the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of the law, such deed shall be considered and operate as a conveyance of all the right, title and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

By failing to strictly comply with the statutory notice and other requirements on the seizure and sale of the subject property, the United States did not act "substantially in accordance with the provisions of the law." Therefore, the United States did not transfer title to the purchaser, and the United States still has a statutory lien on the property.

Because the district court's holding of a lack of jurisdiction

conflicts with several United States courts of appeals on this important matter, a writ of certiorari should issue.

2. The United States cannot moot this action by its own conduct.

Exhibit A of the declaration of U.S. Dept. of Justice Attorney Caroline F. May, attached to the United States' memorandum, discloses that United States released its notices of tax lien after the Complaint was filed. The United States cannot moot an action properly invoking the jurisdiction of the district court after a complaint is filed, and when a complaint challenges the validity of the tax auction sale, a federal court has jurisdiction under the provisions of § 2410.

The federal courts have followed two approaches to jurisdictional issues concerning § 2410. The line of cases relevant herein holds that an action can be characterized as a § 2410 quiet title action when: (1) the United States claims a mortgage or lien interest in the property; or (2) the United States no longer claims any interest in the property but Virginia Mortgage challenges the validity of the tax auction sale. See e.g., *Murray v. United States*, 520 F. Supp. 1207, 1210 (D.N.D. 1981), *aff'd*, 686 F.2d 1320 (8th Cir. 1982), *cert. denied*, 459 U.S. 1147, 74 L. Ed. 2d 994, 103 S. Ct. 788 (1983); *Bleavins v. United States*, 1990 U.S. App. LEXIS 23,294, at *5-*7 (7th Cir. 1990) (following *Murray*); *Aqua Bar & Lounge v. United States*, 539 F.2d 935, 937-38 (3rd Cir. 1976) (cited in *Murray*); cf. *Anderson v. IRS*, 1992 U.S. Dist. LEXIS 8126, at *4-*5 (S.D. Ohio 1992) (finding that government, by its actions, waived sovereign immunity).

In *Goodwin*, 935 F.2d at 1063, the United States contended that the sale of the subject property rendered Goodwin's appeal moot. The United States advanced the argument that Goodwin "should have obtained an order from the court enjoining the sale of the Gladstone property pending appeal in order to preserve his rights on

appeal. According to the United States, once a quitclaim deed was issued to a third party pursuant 26 C.F.R. 301.7506-1, Goodwin's opportunity for appellate relief in this court was foreclosed." *Id.* The *Goodwin* Court succinctly set forth the issue it was determining, to wit: "'whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.'" *Goodwin*, 935 F.2d at 1064 (quoting *Stevedoring Services of America v. Ancora Transport*, 884 F.2d 1250, 1253 (9th Cir. 1989)).

The *Goodwin* Court ruled that it could:

> determine the validity of the seizure and lien foreclosure sale through which the government obtained a District Director's Deed pursuant to 26 U.S.C. § 6338(c). See *Kulawy v. United States*, 917 F.2d 729, 733-734 (2d Cir. 1990) (government's sale of automobiles to third party did not moot first party's action against the government to quiet title to those automobiles). This action was correctly instituted under 28 U.S.C. § 2410(a)(1) to quiet title to the Gladstone property. We find "nothing in § 2410(a)(1) that permits the government to oust the court of jurisdiction validly invoked." *Id.* at 734.

Goodwin, 935 F.2d at 1064.

In *Kulawy*, the United States moved for dismissal on the ground that the district court lacked subject matter jurisdiction because, among others, (1) the action had been rendered moot by the sale of the property, and (2) 28 U.S.C. § 2410 does not waive sovereign immunity to quiet title actions where the United States no longer has any interest in the property. The district court rejected the United States's jurisdictional arguments but granted summary judgment dismissing the complaint on the merits.

The United States argued on appeal that the court should have

dismissed the action for lack of jurisdiction. Invoking principles of sovereign immunity, the United States contended that the judgment dismissing the complaint should be affirmed on the ground that the district court lacked jurisdiction over the case. It argued (1) that Kulawy impermissibly sought to raise questions with regard to his liability for assessed taxes, questions as to which the United States has not waived its sovereign immunity in a suit under § 2410, and (2) that even if the court originally had jurisdiction, its jurisdiction was lost once the United States sold the automobiles. The Second Circuit disagreed.

> We find no greater merit in the United States' alternative contention that the district court should have dismissed for lack of jurisdiction once the sale had taken place. The United States had a lien on the automobiles at the time the suit was commenced, and the court plainly had jurisdiction at that time. We see nothing in § 2410(a)(1) that permits the United States to oust the court of jurisdiction validly invoked. Cf. *Bank of Hemet v. United States*, 643 F.2d 661, 665 (9th Cir. 1981) (28 U.S.C. § 2409a permits quiet title action where title to the property later sold was still claimed by the government at time complaint was filed).

Kulawy, 917 F.2d at 733-734.

It has further been held that under § 2410 the United States waives sovereign immunity even in cases where it has already transferred the subject property to a third party. *Aqua Bar*, 539 F.2d at 939-40. Similarly, district courts have ruled that "§ 2410 deals with law suits in which the United States either claims a mortgage or lien in the property, or in which the plaintiff challenges the validity of the tax auction sale." *Lawrence v. Beaman*, 90-2 USTC ¶ 50,514, ¶ 85,731 (n.5) (D. Mass. 1990); *Freedom Mission Church v. Green Bay Packaging, Inc.*, 816 F. Supp. 513 (E.D. Ark. 1993).

In *Brewer v. United States*, 764 F. Supp. 309 (S.D.N.Y. 1991),

the United States argued that jurisdiction is not proper under § 2410(a), in any case, because it no longer had a lien or mortgage on the property and instead held only the proceeds of its seizures and sales. The *Brewer* court disagreed.

> It is a well established rule that if the government properly claims a title interest and not a lien interest, 28 U.S.C. § 2410(a) does not confer jurisdiction. See, e.g., *Bradley, Arant, Rose & White v. United States*, 802 F.2d 1323, 1325 (11th Cir. 1986). In *Kulawy*, although the disputed property had already been sold, the Second Circuit allowed the suit to continue because the government had a lien on the property at the time the suit was commenced. The court reasoned that "nothing in § 2410(a)(1) . . . permits the government to oust the court of jurisdiction validly invoked." *Kulawy*, 917 F.2d at 733-34; cf. *Bank of Hemet v. United States*, 643 F.2d 661, 665 (9th Cir. 1981) (28 U.S.C. § 2409(a) permits quiet title action where the title to the property later sold was still claimed by the government at the time complaint was filed). The Kulawy plaintiff had filed his complaint on November 15 -- the property sale took place on December 5. Thus, at the time the complaint was filed, the government held a lien on the property.

Brewer, 764 F. Supp. at 314.

In *TMG II v. United States*, 778 F. Supp. 37 (D.C.D.C. 1991), the Court analyzed the parallel question of whether the United States could divest jurisdiction by acquiring possession of the property after a complaint if filed. In language equally applicable here, the court ruled:

> The Government correctly notes that the waiver of sovereign immunity in 28 U.S.C. § 2410(a) does not apply when, at the commencement of litigation, the property at issue is in the possession of the United States. See. e.g.,

Trustees of the Puritan Church v. United States, 111 App. D.C. 105, 294 F.2d 734 (D.C. Cir. 1961) (per curiam). There is, however, no precedent for the claim that the IRS may strip a federal court of jurisdiction under § 2410 by the simple expedient of obtaining possession of the property. Quite to the contrary, all three circuits that have considered this contention have rejected it. See *Kulawy v. United States*, 917 F.2d 729, 734 (2d Cir. 1990); *Delta Savings & Loan Assoc. v. Internal Revenue Service*, 847 F.2d 248, 249, n. 1 (5th Cir. 1988); *Bank of Hemet v. United States*, 643 F.2d 661, 665 (9th Cir. 1981).

Moreover, this rejection rests upon a sound reading of the statute. Simply put, there is "nothing in § 2410(a)(1) that permits the government to oust [a] court of jurisdiction validly invoked." *Kulawy v. United States*, 917 F.2d at 733-34 (citation omitted). Nor is there any reason to suppose that Congress intended to give the Executive Branch such power. "The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 . . . (1989) (citation omitted). As a consequence, § 2410(a) is most naturally read to condition the waiver of sovereign immunity on the circumstances at the time the complaint is filed. Indeed, the governments' interpretation would defeat Congress' apparent purpose in consenting to quiet title suits. By consenting to such suits, Congress indicated that it wished title disputes to be resolved by law, not by brute force. The governments' interpretation would, however, give the IRS the power "to manipulate its position subsequent to the filing of the complaint" so as to bar potentially meritorious claims. *Bank of Hemet v. United States*, 643 F.2d at 665. Absent a clear indication to the contrary, Congress should not be

> presumed to have intended such an irrational and unjust result. See, e.g., Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 482 (1989).

TMG, 778 F. Supp. at 42-43. *See also, Travis v. United States*, 73 A.F.T.R.2d 1828 (E.D. Cal. 1994) (same); *Felkel v. United States*, 861 F. Supp. 507, 510 (D.S.C. 1994) (same); *Bay Savings Bank v. Internal Revenue Service*, 837 F. Supp. 150, 153-54 (E.D.Va. 1993) (same); *Verba v. Ohio Casualty Insurance Co.*, 93-2 U.S.T.C. ¶50,363; 71 A.F.T.R.2d 2013 (N.D. Ohio 1993) (same).

It is clear that Congress waived sovereign immunity when United States claims a lien interest on property at the time a suit is filed. Once the court's jurisdiction is validly invoked, there is nothing in § 2410 that permits the United States to oust a court of jurisdiction validly invoked by the subsequent conduct. It is undisputed that United States claimed a lien interest on the Property at the time Virginia Mortgage's Complaint was filed.

Federal courts have also held that § 2410 is a waiver of sovereign immunity even in cases where the United States has already transferred the subject property to a third party. Virginia Mortgage is clearly challenging the validity of the tax auction sale.

Accordingly, the district court had jurisdiction in this matter and the granting of the United States motion was legal error.

Because the district court's holding of a lack of jurisdiction conflicts with several United States courts of appeals on this important matter, a writ of certiorari should issue.

3. 26 U.S.C. § 7426 is not Virginia Mortgage's exclusive remedy.

The United States' also argued that "where as here the plaintiff disputes the United States' actions with respect to a levy to satisfy

the tax liabilities of another person, the plaintiff's exclusive remedy is pursuant to 26 U.S.C. Section 7426." This is not the factual true; indeed, it's a factual impossibility.

On its face, 26 U.S.C. § 7426 requires a plaintiff show: (1) "an interest in or lien on" the subject property, and (2) "that such property was wrongfully levied upon." Here, Virginia Mortgage cannot and did not allege that the subject property was wrongfully levied upon. Virginia Mortgage alleges that the United States impermissibly seized and sold the property in violation of its procedural due process rights. It is an incredible proposition that Virginia Mortgage's remedy for wrongful governmental conduct under 28 U.S.C. § 2410 is superseded by a statute which Virginia Mortgage cannot avail itself of.

B. 26 U.S.C. § 6335.

1. Subject matter jurisdiction may be based on the same statute providing the substantive claim in the case.

The United States argued that the sale of the subject property to Basic cannot be challenged pursuant to § 6335: "Section 6335 nowhere specifically provides for suits against the United States for failure to comply with its provisions."

The federal courts have held that they have discretion to find subject matter jurisdiction based on the same statute which provides the substantive claim in the case. See, e.g., *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). The United States failed to properly serve notice of sale and seizure on Virginia Mortgage as required by 6335(a) & (b), and therefore did not substantially comply with the tax procedures as required by § 6339(b)(2). As argued above, courts have held that where the IRS has already issued a deed and the sale is improper due to non-compliance with notice requirements under § 6335(a) & (b), the deed is void and the district

court must declare it invalid.[2]

Accordingly, the district court had jurisdiction in this matter and the granting of the United States motion was legal error.

Because the district court's holding of a lack of jurisdiction conflicts with several United States courts of appeals on this important matter, a writ of certiorari should issue.

2. Virginia Mortgage's lien was a property interest in the subject property for the purposes of the due process clause of the Fifth Amendment.

The United States argued that Virginia Mortgage's lien does not entitle it to the notices required by § 6335(a) & (b). This is incorrect. The United States cited *The National Bank & Trust Co. v. United*

---

2. The non-assailability of Virginia Mortgage's position is obvious from the weight of decisions supporting it. See *Moss v. United States*, 95-2 U.S.T.C. P50,503; 76 A.F.T.R.2d (P-H) 5266 (D. Az. 1995); *Bonacci v. United States*, 864 F. Supp. 1086 (D. Utah 1993); *Powelson v. United States*, 979 F.2d 141 (9th Cir. 1992); *Verba v. Ohio Casualties Insurance Co.*, 851 F.2d 811 (6th Cir. 1988); *Ringer v. Basile*, 645 F. Supp. 1517, 1524 (D.C. Col. 1986); *Kelly v. Lunding*, 475 N.E.2d 1093 (Ill. App. 1 Dist. 1985); *Douglas v. United States*, 562 F. Supp. 593, 596 (S.D. Ga. 1983); *Brown v. United States*, 496 F. Supp. 903 (D.N.J. 1980); *Silver Bell Industries, Inc. v. United States*, 76-1 U.S.T.C. 9432 (10th Cir. 1976); *Jones v. New Pittsburgh Courier Publishing Company*, 469 Pa. 157, 364 A.2d 1315 (Pa. 1976); *United States v. Conry*, 74-1 U.S.T.C. 9187 (N.D. Cal. 1974); *Johnson v. Gartlan*, 334 F. Supp. 438 (E.D. Va.1971), *rev'd on other grounds*, 470 F.2d 1104 (4th Cir.), *cert. denied*, 414 U.S. 865 (1973); *Yannicelli v. Nash*, 354 F. Supp. 143, 157 n. 7 (D.N.J. 1973); *Little River Farms, Inc. v. United States*, 328 F. Supp. 476 (N.D. Ga. 1971); *Pargament v. Fitzgerald*, 272 F. Supp. 553 (S.D.N.Y. 1967); *Bartell v. Riddell*, 202 F. Supp. 70 (S.D. Cal. 1962); *United States v. Coson*, 286 F.2d 453, 455-56 (9th Cir. 1961); *Margiotta v. United States*, 214 F.2d 518 (2nd Cir. 1954); *McAndrews v. Belknap*, 141 F.2d 111 (6th Cir. 1944).

States, 589 F.2d 1298, 1301-02 (7th Cir. 1978) to support its argument. That case is distinguishable from the case at bar. There, the Seventh Circuit held that the Bank's due process rights were not violated, because its interest as a senior lien holder was unaffected by the seizure and sale. In this case, Virginia Mortgage's interest, under the United States' theory, is extinguished by § 6339(c) because it is a junior encumbrance. Argument I(B), above, however, demonstrates that Virginia Mortgage has a sufficient interest in the property to require notice under § 6335(a) & (b).

C. 26 U.S.C. § 7433

The United States' argued that "Virginia Mortgage is not entitled to damages under § 7433 because Virginia Mortgage is not a 'taxpayer' within the meaning of that section in connection with the seizure and subsequent sale of the Property." This Court's recent decision in *United States v. Williams*, 514 U.S. 527 (1995), requires another look at such a restrictive reading of the term "taxpayer."

In *Williams*, the ex-wife of a delinquent taxpayer paid her ex-husband's tax debt under protest to remove several Federal Tax Liens, which were impeding the imminent closing of a sale of the encumbered property. The Court held that a person who pays another's tax liability under compulsion may claim a refund under § 1346(a)(1), and the fact that a wrongful lien compelled payment of the tax does not require that a claim under § 7426 be the exclusive remedy.

In *Williams*, the United States argued that the ex-wife could not bring a claim under § 1346, because she was not the "taxpayer" within the definition of § 7701(a)(14). This Court specifically rejected the United States' reading of the term "taxpayer," holding that:

> the Government reads the definition [of taxpayer] as if it said "any person who is assessed any internal revenue tax,"

> but these are not Congress' words. The general phrase "subject to" is broader than the specific phrase "assessed" and, in the tax collection context before us, we think it is broad enough to include Williams. In placing a lien on her home and then accepting her tax payment under protest, the government surely subjected Williams to a tax, even though she was not the assessed party.

Williams, 514 U.S. at 535.

Cases holding that third parties do not have standing under § 7433 were decided prior to *Williams* and/or do not discuss that decision. This inquiry, however, does not conclude the analysis. The question remains whether the holding in *Williams*, removing the exclusivity requirement of a § 7426 claim, is limited to actions involving claims under 28 U.S.C. § 1346, which is a post deprivation remedy, available only to individuals who have paid in full, or whether its holding equally applies to parties seeking damages such as Virginia Mortgage.

Both the Ninth and Tenth Circuits have held that *Williams* does not remove the exclusivity requirement in concurrent actions under § 7426 and 28 U.S.C. § 2410. *Fidelity and Deposit Company of Maryland v. City of Adelanto*, 87 F.3d 334, 337 (9th Cir.1996) (holding that a party cannot bring a § 7426 and § 2410 claim concurrently); *Dahn v. United States*, 127 F.3d 1249 (10th Cir. 1997) (same). But as pointed out in *Dahn*, the case at bar, like *Williams*, is not currently a § 7426 case.

The reasoning of *Williams* undermines those cases to the extent that they rely on the more restrictive reading of the term taxpayer, limiting standing to the direct taxpayer only. Examining the statutes in light of *Williams* and heeding this Court's admonishment to "show[] our preference for common sense inquiries over formalism," the term taxpayer includes Virginia Mortgage; a party against whom the employees of the IRS took unauthorized collection actions.

Therefore, § 7433 authorizes a damage action.

Accordingly, the district court had jurisdiction in this matter and the granting of the United States motion was legal error.

Because the district court's dismissal is contrary to a relevant decision of this Court, a writ of certiorari should issue.

CONCLUSION

For each and all of the above grounds, a writ of certiorari should issue.

The decisions below should be reversed.

Respectfully submitted,

Knox Kent Lively III
P.O. Box 2227
Greensboro, NC 27402
(336) 275-6669

Attorney for Petitioner

APPENDIX A

VIRGINIA MORTGAGE COMPANY, Virginia Mortgage - Appellant, versus UNITED STATES OF AMERICA; HAROLD MILHOLEN, a/k/a The Basic Group, Defendants - Appellees.

No. 98-2516

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

1999 U.S. App. LEXIS 4809

March 22, 1999, Decided

NOTICE: RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Middle District of North Carolina, at Durham. N. Carlton Tilley, Jr., District Judge. (CA-97-1122-1).

DISPOSITION: AFFIRMED.

COUNSEL: Knox Kent Lively III, Greensboro, North Carolina, for Appellant.

Loretta C. Argrett, Assistant Attorney General, Charles E. Brookhart, Janet A. Bradley, Walter Clinton Holton, Jr., United States Attorney, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee United States; Benjamin Spence Albright, Ramseur, North Carolina, for Appellee Milholen.

JUDGES: Before WIDENER and KING, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

OPINION:

PER CURIAM:

Virginia Mortgage Company appeals from the district court's opinion granting summary judgment in favor of Harold Milholen on Virginia Mortgage's supplemental state claim to quiet title and dismissing its action against the United States seeking to quiet title, 28 U.S.C.A. § 2410(a) (West Supp. 1998), and requesting damages for wrongful levy, 26 U.S.C.A. § 7433 (West Supp. 1998). We conclude that summary judgment was properly granted in favor of Milholen because Virginia Mortgage failed to sufficiently show an ownership interest in the subject property and that the action against the United States was properly dismissed as an unopposed motion. Accordingly, we affirm the order of the district court. See Virginia Mortgage Co. v. United States, No. CA-97-1122-1 (M.D.N.C. Aug. 12, 1998). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

VIRGINIA MORTGAGE CO., Virginia Mortgage, v. UNITED STATES OF AMERICA, and HAROLD MILHOLEN, d/b/a/ THE BASIC GROUP, Defendants.

1:97CV01122

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA,
DURHAM DIVISION

1998 U.S. Dist. LEXIS 13359; 82 A.F.T.R.2d (RIA) 6036

August 12, 1998, Filed

DISPOSITION: Defendant Harold Milholen's Motion to Dismiss (treated as a motion for summary judgment) [Doc. # 5] and Defendant United States of America's Motion to Dismiss [Doc. # 20] both GRANTED. Virginia Mortgage's Motion for Additional Time to Respond to Defendant's Motion to Dismiss [Doc. # 25] DENIED. Action dismissed in its entirety.

CORE TERMS: summary judgment, ownership interest, excusable neglect, declaration, neglect, clerk, deed, potential impact, corporate seal, conveyance, excusable, recorded, notice, movant, jury verdict, uniformity, unopposed, untimely, properly authenticated, opposing party, matter of law, registration, signatures, purports, mailed, contractual, inexcusable, ownership, register, ensuring.

COUNSEL: For VIRGINIA MORTGAGE CO., Virginia Mortgage: KNOX KENT LIVELY, III, GREENSBORO, NC.

For UNITED STATES OF AMERICA, defendant: CAROLINE F. MAY, U. S. DEPARTMENT OF JUSTICE, WASHINGTON, DC.

For HAROLD MILHOLLAND, defendant: BENJAMIN SPENCE ALBRIGHT, RAMSEUR, NC.

JUDGES: N. Carlton Tilley, Jr., United States District Judge.

OPINIONBY: N. Carlton Tilley, Jr.

OPINION: MEMORANDUM OPINION

This matter is before the Court on several motions. Defendant Harold Milholen has filed a Motion to Dismiss [Doc. # 5], which pursuant to the Order entered on February 26, 1998 [Doc. # 12], the Court is treating as a motion for summary judgment. Defendant United States of America has also filed a Motion to Dismiss [Doc. # 20]. Virginia Mortgage Virginia Mortgage Company ("Virginia Mortgage") filed a Motion for Additional Time to Respond to Defendant's Motion to Dismiss [Doc. # 25]. For the reasons given below, Defendants' Motions to Dismiss [Doc. ## 5, 20] are GRANTED. Virginia Mortgage's Motion for Additional Time [Doc. # 25] is DENIED.

I.

This case purports to be an action to quiet title pursuant to 28 U.S.C. § 2410(a) and for damages pursuant to 26 U.S.C. § 7433. It concerns real property, including a warehouse, located at 158 Credle Street in Pittsboro, Chatham County, North Carolina (the "Property"). The facts concerning the Property, taken in the light most favorable to Virginia Mortgage, are as follows: the Internal Revenue Service ("IRS") recorded notices of federal tax liens on the Property with the Clerk of Court in Chatham County on December 27, 1995, February 14, 1996, April 7, 1997, and June 4, 1997. At that time, the Property was owned by N & S Vending Service, Inc. ("N & S"). Virginia Mortgage, which calls itself a "contractual trust established under the common law," n1 (see Compl. at 1,) claims that it purchased the Property from N & S on August 5, 1996. (See id. at 5-6.) Sometime in 1997, the IRS seized the Property from N & S. On May 29, 1997, the IRS sold the Property to the Basic Machinery Company, Inc. ("Basic Machinery"). Mr. Milholen later acquired an

undivided interest in the Property from Basic Machinery.

n1 The Court is not familiar with such a legal entity and has been unable to locate any North Carolina authority which even refers to a "contractual trust."

II.

Mr. Milholen, in his Motion to Dismiss, suggests that this Court has no jurisdiction over this case pursuant to Rule 12(b)(1), (b)(2), (b)(5), and (b)(6) of the Federal Rules of Civil Procedure. One basis for Mr. Milholen's Motion is his suggestion that Virginia Mortgage has no ownership interest in the Property. His Motion was converted into one for summary judgment to allow Virginia Mortgage to point to evidence that would establish such an interest. Without such an interest, Virginia Mortgage has no standing to bring its Complaint. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). If Virginia Mortgage has no standing, this Court has no jurisdiction over the subject matter of this case, see id., and summary judgment for Mr. Milholen must be granted. Whether Virginia Mortgage has an ownership interest in the Property is determined by North Carolina law. See Erie R.R. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188 (1938).

Summary judgment is proper only if there is no genuine issue as to any material fact. The party moving for summary judgment has the burden of: (1) pointing to deficiencies in the record as to matters upon which the opposing party has the burden of proof such that the opposing party cannot prove its claim or defense, or; (2) showing otherwise why, upon the undisputed facts in the record, the moving party is entitled to judgment as a matter of law. The party opposing the motion for summary judgment may not merely rest on its pleadings, but must provide evidence or point to evidence already in the record, properly authenticated pursuant to Rule 56(e), that would be sufficient to support a jury verdict in its favor. See Fed. R. Civ. P.

56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Orsi v. Kirkwood, 999 F.2d 86, 92 (4th Cir. 1993). The test to be applied in determining sufficiency of the evidence on the questioned point, therefore, mirrors that applied at the directed verdict (now "judgment as a matter of law") stage of a trial. See Herold v. Hajoca Corp., 864 F.2d 317, 319 (4th Cir. 1988), cert. denied, 490 U.S. 1107, 104 L. Ed. 2d 1022, 109 S. Ct. 3159 (1989).

In this case, Virginia Mortgage must point to affidavits or other evidence sufficient to support a jury verdict that it has an ownership interest in the Property. Although Virginia Mortgage has attempted to point to evidence suggesting that it has such an interest, the evidence in the record could not support a jury verdict in its favor.

North Carolina uses a pure race scheme for registration of land titles. See N.C.G.S. § 47-18; Bourne v. Lay & Co., 264 N.C. 33, 35, 140 S.E.2d 769, 771 (1965). In other words, if there are two purchasers for value of the same interest in land, the one whose deed is first registered acquires title. See Bourne, 264 N.C. at 35, 140 S.E.2d at 771. To effect a proper registration, a party conveying an entire interest in land must file a written document evidencing the conveyance with the register of deeds in the county in which the property is located. See N.C.G.S. § 43-31. This document must contain, among other things, the signatures of both the buyer(s) and the seller(s). See id.; State v. Johnson, 278 N.C. 126, 144, 179 S.E.2d 371, 383 (1971).

In this case, the record contains a properly executed deed to the Property, in the name of Basic Machinery, recorded on December 3, 1997. (See Paschal Aff. Ex. B.) Therefore, Virginia Mortgage must point to evidence that would establish that it had properly executed and recorded its ownership interest in the Property prior to this date. See N.C.G.S. § 47-18; Bourne, 264 N.C. at 35, 140 S.E.2d at 771. The evidence offered by Virginia Mortgage in its response to Mr. Milholen's motion is an unsworn declaration signed by a person who

claims to be a "trustee" of Virginia Mortgage, Thomas E. Tilley. This declaration is not properly authenticated pursuant to Rule 56(e) and is therefore not considered by the Court. See Anderson, 477 U.S. at 250; Orsi, 999 F.2d at 92. Even if it were to be considered, however, the declaration contains no specific facts on which a jury could base a finding that Virginia Mortgage has an ownership interest in the Property. The declaration says only that "Virginia Mortgage purchased the subject property on August 5, 1996 from N & S Vending Service, Inc., and funds to N & S Vending Service, Inc. were tendered." (See Pl.'s Resp. Def. Milholen's Mot. Dismiss Ex. 1 ¶ 2.) It contains no specific facts concerning any of the requirements of North Carolina's recording act, and would be insufficient to demonstrate ownership in the face of the other evidence in the record.

Also, Mr. Tilley's declaration conflicts with another piece of evidence offered by Mr. Milholen, a document entitled "Notice of Federal Common Law Lien Writ of Attachment on Real & Personal Property." (See Paschal Aff. Ex. A.) This document, signed by Mr. Tilley but not by any representatives of N & S, purports to be one "to secure investment & repayment of loan" rather than one which provides evidence of purchase or ownership. (See id.) This document was filed with the register of deeds in Chatham County on August 5, 1996, (see id.), but the registry contains no record of any proceeding to perfect this "lien."

Mr. Milholen also argues that summary judgment should be granted because Virginia Mortgage can point to no evidence of a conveyance from N & S containing **[*8]** a corporate seal. In North Carolina, a conveyance of real property by a corporation is invalid unless it is sealed with the corporation's seal or a facsimile thereof. See N.C.G.S. §§ 47-41, 47-41.1; Investors Corp. v. Field Fin. Corp., 5 N.C. App. 156, 158, 167 S.E.2d 852, 853 (1969). The record contains no documents bearing N & S's corporate seal. The lack of such evidence is therefore an alternate ground for granting Mr. Milholen's motion.

In summary, the record contains no evidence of a recorded document containing the signatures of both parties to the claimed sale and the N & S corporate seal, both of which would be required to withstand a motion for summary judgment. Because there is no genuine issue of material fact concerning Virginia Mortgage's lack of ownership interest in the Property, Mr. Milholen's Motion to Dismiss is granted. n2

> n2 Mr. Milholen has also argued that Virginia Mortgage is unable to prove an ownership interest in the property because of the Statute of Frauds, see N.C.G.S. § 22-2. The Statute of Frauds, however, is not available as a defense to a litigant who was not a party to the contract in question. See Childress v. Abeles, 240 N.C. 667, 678, 84 S.E.2d 176, 184-85 (1954); 73 Am. Jur. 2d Statute of Frauds § 578 (1974).

III.

The next issue is whether to grant Virginia Mortgage's Motion for Additional Time to Respond to the United States' Motion to Dismiss. On May 21, 1998, the United States served Virginia Mortgage by mail with a copy of its Motion to Dismiss. Virginia Mortgage's response to this Motion was due no later than June 11, 1998. On June 23, 1998, the Clerk of the Court sent counsel for Virginia Mortgage a letter notifying him that the United States' motion would be referred to the Court on July 13, 1998, for consideration as an unopposed motion. The letter also notified counsel that an explanation for the failure to respond and a proposed response would be submitted to the Court if Virginia Mortgage could demonstrate excusable neglect. On July 13, 1998, Virginia Mortgage filed a Response to the United States' Motion to Dismiss. On July 15, 1998, Virginia Mortgage filed a Motion for Additional Time to Respond to Defendant's Motion to Dismiss. Two days later, Virginia Mortgage filed an Amendment to its Motion for Additional Time to Respond to Defendant's Motion to Dismiss, in which it noted that counsel for the United States did not object to its Motion for

Additional Time but that counsel for Mr. Milholen did object. Because the reason for the untimely filing of Virginia's Mortgage's Response to the United States' Motion to Dismiss does not constitute excusable neglect, its Motion for Additional Time is denied.

Rule 6(b) of the Federal Rules of Civil Procedure allows a court to permit an untimely filing if the failure was the result of "excusable neglect." Whether neglect is excusable is determined by an analysis of four factors: (1) the danger of prejudice to the non-moving party; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. See Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 395, 113 S. Ct. 1489, 1498, 123 L. Ed. 2d 74 (1993); Thompson v. E.I. DuPont de Nemours & Co., Inc., 76 F.3d 530, 533 (4th Cir. 1996). Neglect is not excusable simply because it may be attributed solely to counsel rather than to a litigant; litigants are held responsible for the acts and omissions of their counsel. See Pioneer Inv. Serv., 507 U.S. at 397; 113 S. Ct. at 1499.

In Thompson, the Fourth Circuit held that "the most important of the factors identified in Pioneer for determining whether 'neglect' is 'excusable' is the reason for the failure" to comply with the requirement at issue. See Thompson, 76 F.3d at 534. In fact, the Thompson court did not even consider the other three factors. Thompson, the movant in the case, had mailed her notice of appeal from Richmond, Virginia to the clerk's office, also in Richmond. Id. at 531. Although she mailed the notice three days before the filing deadline, the post office took six days to deliver it. Id. The Fourth Circuit affirmed the district court's denial of her motion for enlargement of time to file an appeal based on excusable neglect. Id. The court found that this circumstance was not at all exceptional and that the failure of Thompson's counsel "to take any steps whatsoever to check on the letter's progress" constituted neglect that was "nothing more than inexcusable run-of-the-mill inattentiveness by

counsel." Id. at 535.

In this case, Virginia Mortgage's Motion for Additional Time cannot survive the Pioneer inquiry required by Thompson. The reason for the delay, the most important factor to consider, was a personnel shortage in the office of counsel for Virginia Mortgage. (See Pl.'s Mot. Additional Time at 2.) The fact that counsel's office was temporarily understaffed does not absolve counsel of the responsibility to meet well established filing deadlines. Nor should Virginia Mortgage be deemed unaccountable for its counsel's mistake. See Pioneer Inv. Serv., 507 U.S. at 397; 113 S. Ct. at 1499. Counsel's failure to timely file its Response is at least equal to the inattention found inexcusable in Thompson.

The length of the delay and its potential impact on the judicial proceedings also suggest that Virginia Mortgage's Motion should be denied. Virginia Mortgage's Response was filed more than a month late. Its Motion for Additional Time was filed two days after the Response, as well as two days after the date on which the Clerk had told counsel that the United States' Motion to Dismiss would be referred to the Court as unopposed. One important purpose of the Federal Rules of Civil Procedure is to give uniformity to judicial proceedings and thus allow parties and attorneys to form reliable expectations. Allowing the Rules to be avoided because of regularly occurring events such as temporary staff shortages or heavy caseloads would undermine the Rules' purpose of ensuring uniformity. The same purpose requires Virginia Mortgage's Motion to be denied despite the United States' lack of objection to it. Allowing attorneys to circumvent the Rules by agreement also defeats their purpose of ensuring uniformity.

The other two factors named by Pioneer do not suggest that Virginia Mortgage's untimely filing should be considered the product of excusable neglect. However, the reason for the delay and its potential impact on judicial proceedings as a whole require that Virginia Mortgage's Motion for Additional Time be denied. n3 The

United States' Motion to Dismiss is therefore granted as unopposed.

n3 The Court also notes that, even if Virginia Mortgage's Motion for Additional Time were granted, its claim against the United States would fail for the same reasons that it fails against Mr. Milholen. See supra at 2-6.

IV.

For the reasons stated above, Defendants' Motions to Dismiss [Doc. # # 5, 20] are GRANTED. Virginia Mortgage's Motion for Additional Time to Respond to Defendant's Motion to Dismiss [Doc. # 25] is DENIED.

This the 12th day of August, 1998.

N. Carlton Tilley, Jr.

United States District Judge

ORDER AND JUDGMENT

For the reasons stated in the Memorandum Opinion filed herewith, IT IS ORDERED AND ADJUDGED that Defendant Harold Milholen's Motion to Dismiss (treated as a motion for summary judgment) [Doc. # 5] and Defendant United States of America's Motion to Dismiss [Doc. # 20] are both GRANTED. Virginia Mortgage's Motion for Additional Time to Respond to Defendant's Motion to Dismiss [Doc. # 25] is DENIED. This action is dismissed in its entirety.

This the 12th day of August, 1998.

N. Carlton Tilley, Jr.
United States District Judge